has paid the one or the other penalty.[6] Similarly where the Court adds a penalty, of its own motion, to that prescribed by law, such as the addition of the words "at hard labor,"[7] the writ of *habeas corpus* has been allowed; and always where the record shows the verdict to have been irregularly rendered, as by eleven jurors.[8] Generally speaking, however, the courts are very jealous of this remedy, and it has even been refused in a case in which a penitentiary sentence was imposed for an offence punishable only in the county jail,[9] the Supreme Court of South Carolina declaring this a clear case for a remedy by appeal. This particular decision would seem to be a questionable one from the standpoint of jurisdiction, but it represents the extreme reluctance of many courts to permit a collateral attack upon the judgment of a trial Judge. English courts, says Mr. Church, are particularly conservative in this respect.

There was a strong dissent delivered in *ex parte Burden* by Mr. Justice MAYES, based upon the proposition that the Circuit Judge was forced to construe an ambiguous verdict, and that a sentence imposed upon his interpretation thereof, even though erroneous, could not be assailed in this manner. This position is sustained by the decision of the Supreme Court of the United States in the case of *in re,* Eckhart, 166 U. S., 481 (1896), and under the reasoning in that case would seem to be sound, if we admit the verdict to be ambiguous. But it can hardly be said that a verdict of "assault and battery with intent to commit manslaughter" is an equivocal conviction, manslaughter being the form of homicide in which the element of intent is not found.

The decision of the majority of the court appears to be sound on principle and in consonance with the authority of the most carefully considered cases, and constitutes one more step toward uniformity in the application of the principles of justice in this somewhat confused domain of the law.

EMPLOYERS' LIABILITY ACT.

This Act (34 Stat. at L. 232 chap. 3073) was declared unconstitutional by the Supreme Court of the United States in

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[6] *In re Bonner,* 151 U. S., 242 (1893); *U. S.* v. *Pridgeon,* 153 U. S., 48 (1893).

[7] *Ex parte Kelly,* 65 Cal., 154 (1884).

[8] *Scott* v. *State,* 70 Miss., 247 (1892).

[9] *Ex parte Bond,* 9 S. Car., 80 (1877).

the recent case of *Howard* v. *Illinois Central Ry. Co.* (decided January 6, 1908). A majority of the court held that the act applied to intrastate commerce as well as interstate commere, and based the invalidity of the Act on this ground. Of the justices concurring in the result of the opinion delivered by Mr. Justice WHITE, three were "not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant"—these were the Chief Justice and Justices BREWER and PECKHAM. The remaining justices affirmed the power of Congress to alter the fellow-servant rule.

The reasoning upon which this power was sustained is found in the opinion of Mr. Justice WHITE and in the dissenting opinion of Mr. Justice MOODY. The control of Congress in this matter is derived from the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes;" and it is asserted that the power is "nothing less than the whole power which any government can properly exercise over either" (subject to the general restrictions imposed by the Constitution). The previous inaction of Congress is not an implication against the existence of the power, because the regulation of marine commerce had until some forty years ago absorbed the attention of that body. The test of the existence of the power in any given case is not merely the matter regulated, but whether the regulation of such matter is a regulation of interstate commerce; thus the relation of master and servant comes within the scope of Congressional regulation, when that relation directly affects interstate commerce.[1] The present subject is within this principle, since it is of primary importance in the conduct of interstate commerce that regard should be had for the safety of those engaged therein. Moreover, the power of Congress to regulate the relation of master and servant in matters directly affecting interstate commerce is supported by precedent; for in many cases it has been held that a State could affect this relation under such circumstances providing Congress had not acted, thus implying that Congress

[1] Cases are cited showing that the power of Congress to regulate commerce extends to persons as well as goods.

"Congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that (interstate) commerce." Field, *J.*, in *Nashville Railway* v. *Alabama*, 128 U. S., 96. See also statements of Mr. Justice Harlan to effect that Congress could regulate "the whole subject of the liability of interstate railroad companies for the negligence of those in their service," in *Pierce* v. *Van Dusen*, 78 Fed., 693.

had the power to act;[2] and also that the safety-appliance act—the constitutionality of which has been sustained by this court—is a regulation of the relation of master and servant in connection with the rule of *"volenti non fit injuria."*

The second point involved—the decision of which differentiates the majority and minority opinions—is whether the Act was intended to apply to intrastate as well as interstate commerce. This was the only mooted question, for it was conceded by all, that if the Act purported to include intrastate commerce, that it was unconstitutional. It was, moreover, admitted that if such was the intent of the Act that the court could not give the Act a narrower meaning;[3] nor could the Act be saved in so far as it applied to the District of Columbia and the Territories, for the provisions of the Act were "single and incapable of separation."

The grounds upon which the majority concludes that the intention of Congress was to embrace intrastate commerce were: that the words of the first section of the statute clearly manifested such an intention, in that the Act was to apply to "every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States, etc.;" and that in defining the servants to which the Act should extend, the words used are *"any* of its employees" (italics not in the statute).

We pass to the reasoning of the minority opinion. The presumption is in favor of the validity of an act of Congress, and "every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."[4] The enumeration of territorial, interstate and foreign commerce and the omission of the internal commerce of the State, show that Congress was conscious of its limitations and inteded not to exceed them.[5] Regarded from this standpoint, the words "any of its employees" applies to any of its employees while engaged in interstate commerce.[6]

Several minor points were raised against the unconstitu-

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[2] *Smith* v. *Ala.*, 124 U. S., 465.

[3] Trademark Cases, 100 U. S., 82.

[4] Waite, *C. J.*, in Sinking Fund Cases, 99 U. S., 700, at p. 718.

[5] Marshall's, *C. J.*, remarks as to the scope of the interstate commerce clause are cited as applicable to the construction of this statute. "The enumeration presupposes something not enumerated; and that something, if we regard the language * * * must be the exclusively internal commerce of the state." *Gibbon* v. *Ogden*, 9 Wheaton, 194, 195.

[6] A striking parallel is made between the present case and the case

tionality of the statute, which are not passed upon in the opinion, announcing the decision of the Court, although with one exception they are summarily disposed of in the opinion of Mr. Justice MOODY. That exception is the provision of the statute "forbidding the employee to make a contract releasing his employer from the consequences of his negligence." On this question Mr. Justice MOODY does not pass, but states that, being a separable provision, the determination of its validity cannot affect the decision of the case before him, which arises under other provisions of the Act.

RECOVERY FOR DAMAGES FOR MENTAL SUFFERING IN TORT AND IN CONTRACT.

The right to recover for damages for mental suffering, in actions arising *ex delicto* and *ex contractu,* is a question in the law concerning which there is a diversity of judicial opinion.[1] There is an apparent reluctance to grant recovery in such cases, due chiefly, perhaps, to the difficulty of definitely ascertaining the true measure of damage from a pecuniary point of view.[2]

In actions arising *ex delicto* the weight of authority is in favor of a recovery for anguish of mind, but the right is limited to three well defined classes of cases, viz., first, where some physical injury has been inflicted;[3] second, where the plaintiff has been subjected to personal indignity, as in defamation, malicious prosecution, or seduction;[4] and third, where a

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of *McCullough* v. *Virginia,* 172 U. S., 102. Mr. Justice Brewer's language is cited: "However broad and general its (a statute's) language it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the Legislature to reach," p. 112. Note, however, that the statute there referred to was a state statute. It would seem that such statutes are more leniently treated than acts of Congress in that the mere fact that on their face they apply to objects in general, some of which are outside the power of state control, invadidates them only *pro tanto;* the explanation, perhaps, is that the Federal Government, in contradistinction to that of the state, is a government of limited powers.

[1] See *Beaulieu* v. *Great Northern Ry. Co.,* 114 N. W. Rep. (Minn.), at p. 353 (Dec. 27, 1907).

[2] *Ibid.,* at p. 355.

[3] 8 Am. and Eng. Enc. Law, 658; Cent. Dig. (Am. Ed.), vol. 15, Col. 1756, sec. 100.

[4] 8 Am. and Eng. Enc. Law, 668; Cent. Dig. (Am. Ed.), vol. 15, Col. 1756, sec. 100.